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No. 77-787

In the Supreme Court of the United States

OCTOBER TERM, 1977

LEWIE FRANK TIDWELL, PETITIONER

v.

UNITED STATES OF AMERICA

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

BRIEF FOR THE UNITED STATES IN OPPOSITION

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INDEX

	Page
Opinion below -----	1
Jurisdiction -----	1
Questions presented -----	2
Statement -----	2
Argument -----	2
Conclusion -----	4
	17

CITATIONS

Cases:	
<i>Andresen v. Maryland</i> , 427 U.S. 463-----	10
<i>Barnes v. United States</i> , 412 U.S. 837-----	10
<i>Benton v. Maryland</i> , 395 U.S. 784-----	10
<i>Cohen v. United States</i> , 378 F. 2d 751-----	7
<i>Crovedi v. United States</i> , 517 F. 2d 541-----	11
<i>Ethridge v. United States</i> , 494 F. 2d 351, certiorari denied, 419 U.S. 1025-----	11
<i>Government of Canal Zone v. Fears</i> , 528 F. 2d 641-----	11
<i>Harrison v. United States</i> , 279 F. 2d 19, certiorari denied, 364 U.S. 864-----	5
<i>Mann v. United States</i> , 319 F. 2d 404, certiorari denied, 375 U.S. 986-----	7
<i>Ramirez v. United States</i> , 318 F. 2d 155-----	5
<i>United States v. Barash</i> , 365 F. 2d 395-----	13
<i>United States v. Bertolotti</i> , 529 F. 2d 149-----	7
<i>United States v. Binetti</i> , 547 F. 2d 265-----	11
<i>United States v. Chiantese</i> , 560 F. 2d 1244-----	7, 8
<i>United States v. Diggs</i> , 527 F. 2d 509-----	7
<i>United States v. Docherty</i> , 468 F. 2d 989-----	5
<i>United States v. Eisler</i> , C.A. 8, No. 77-104, decided December 19, 1977-----	15
<i>United States v. Holder</i> , 560 F. 2d 953-----	15
<i>United States v. Hooper</i> , 432 F. 2d 604-----	11
<i>United States v. Jenkins</i> , 530 F. 2d 1203-----	13

Cases—Continued

	Page
<i>United States v. Mann</i> , 517 F. 2d 259, certiorari denied, 423 U.S. 1087	5
<i>United States v. Maze</i> , 468 F. 2d 529, affirmed, 414 U.S. 395	11, 13
<i>United States v. McLeod</i> , 493 F. 2d 1186	11
<i>United States v. Netterville</i> , 553 F. 2d 903, certiorari denied, No. 77-237, January 9, 1978	7
<i>United States v. Pollack</i> , 503 F. 2d 87	5, 9
<i>United States v. Releford</i> , 352 F. 2d 36	7
<i>United States v. Robinson</i> , 545 F. 2d 301	7
<i>United States v. Smith</i> , 550 F. 2d 277	11
<i>United States v. Tanner</i> , 471 F. 2d 128, certiorari denied, 409 U.S. 949	11, 12
<i>United States v. Wilkinson</i> , 460 F. 2d 725	7
Statutes, regulations, and rule:	
Rev. Stat. 5209 (1878)	4
62 Stat. 683	4
12 U.S.C. (1946 ed.) 592	4
18 U.S.C. 334	4, 5
18 U.S.C. 656	2, 4, 5, 12, 13
18 U.S.C. 1005	2, 4, 5, 8, 9, 11, 12, 16
28 C.F.R. 2.20	15
Fed. R. Crim. P. 35	14
Miscellaneous:	
42 Fed. Reg.	15
pp. 39813-39815	16
p. 39814	15
p. 39815	15

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 559 F. 2d 262.

JURISDICTION

The judgment of the court of appeals was entered on September 14, 1977. A petition for rehearing was denied on November 1, 1977 (Pet. App. B). The petition for a writ of certiorari was filed on December 1, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

(1)

QUESTIONS PRESENTED

1. Whether the district court's instructions to the jury shifted the burden of proof to petitioner.
2. Whether the court of appeals properly applied the concurrent sentence doctrine.

STATEMENT

After a jury trial in the United States District Court for the Northern District of Florida, petitioner was convicted on five counts of issuing letters of credit obligating a Federal Reserve System member bank without authority from the directors of that bank, in violation of 18 U.S.C. 1005, and two counts of misapplying bank funds, in violation of 18 U.S.C. 656. He was sentenced to concurrent terms of three years' imprisonment. The court of appeals affirmed (Pet. App. A).

The relevant facts are undisputed. Petitioner was hired in September 1972 as the president of the Eglin National Bank in Fort Walton Beach, Florida. During his tenure in that capacity, he drew and issued numerous letters of credit without the approval of the bank's board of directors (Pet. App. 2a). The five instruments that formed the basis for petitioner's conviction on the letter of credit counts obligated the Eglin bank in the total amount of \$470,000 (Tr. 461-471). One of these letters, in the amount of \$43,500, was issued to Marvin Chapman (Pet. App. 2a).

Petitioner was also convicted on two counts of misapplication of bank funds. These charges stemmed from a complex transaction in which four banks, in-

cluding Eglin National and Merchants National Bank of Mobile, Alabama, loaned \$600,000 to Chapman and received as collateral two parcels of unimproved property with an appraised value in excess of \$500,000 (Tr. 474-476). In June 1974, Chapman approached petitioner and offered 37 condominium units valued at \$700,000 as additional collateral for his indebtedness if Eglin would cover a check for \$43,000 written by Chapman without sufficient funds, and pay approximately \$40,000 for the first mortgage on the condominiums, held by the Great American Mortgage Company. Petitioner contacted Merchants National Bank and, on July 17, 1974, Merchants credited Eglin's account in the amount of \$85,000, on the understanding that the funds would be used to obtain the first mortgage on the condominium units. Petitioner applied \$43,000 of these funds to cover Chapman's bad check, and attempted to redeem the mortgage with \$38,000 of the remaining funds. Great American, however, refused the offer. In early August 1974, the \$43,500 letter of credit issued to Chapman by petitioner was called and immediate payment was required. Petitioner paid this obligation, using primarily the remaining \$42,000 credited to Eglin's account by Merchants. The payments on Chapman's overdraft and his letter of credit formed the basis for one count charging misapplication of bank funds. Finally, after another unsuccessful attempt, petitioner secured the first mortgage on the condominiums for \$41,562.61. Petitioner paid this sum out of Eglin's funds without

the knowledge or approval of the bank's board of directors. This use of the bank's money formed the basis for the second misapplication count (Pet. App. 3a-4a).

On appeal, petitioner attacked his convictions on the misapplication counts on the ground that the district court had charged the jury improperly with respect to the burden of proof on the intent element of Section 656. Petitioner also challenged an evidentiary ruling of the district court that excluded testimony concerning the Eglin bank's ultimate foreclosure on the mortgage covering the condominium units.¹ The court of appeals rejected petitioner's arguments and affirmed his convictions on the misapplication counts. Relying on the concurrent sentence doctrine, the court found it unnecessary to consider the validity of petitioner's convictions on the counts charging him with unauthorized issuance of letters of credit (Pet. App. 14a).

ARGUMENT

Both statutory provisions under which petitioner was convicted are derived from 12 U.S.C. (1946 ed.) 592, which, in turn, originated in Rev. Stat. 5209 (1878). Apparently, one element of any offense under Section 592 or Section 5209 was an intent to defraud or injure a bank or banking association. In the 1948 federal criminal law codification, 62 Stat. 683, Section 592 was revised and separated into three sections, 18 U.S.C. 334, 656, and 1005. The Reviser's Notes indicated that the revision was intended to clarify and

condense "without changing in any way the meaning or substance of existing law." Nevertheless, perhaps by oversight, the explicit requirement of an intent to defraud or injure a bank was included only in the third paragraph of Section 1005 and not at all in Sections 334 or 656.

In *Harrison v. United States*, 279 F. 2d 19, 23 (C.A. 5), certiorari denied, 364 U.S. 864, the Fifth Circuit held that "no specific intent to injure or defraud a bank is an ingredient in the offense charged in the first two paragraphs of Section 1005." In *United States v. Pollack*, 503 F. 2d 87, 90 (C.A. 9), the Ninth Circuit reached a contrary conclusion. (The five unauthorized issuance counts on which petitioner was convicted charged him with violating the second paragraph of Section 1005.) In *United States v. Mann*, 517 F. 2d 259, 267 (C.A. 5), certiorari denied, 423 U.S. 1087, the Fifth Circuit held that an intent to injure or defraud is an element of the offenses covered by Section 656, *i.e.*, theft, embezzlement, or misapplication of bank funds by a bank officer or employee. See also *United States v. Docherty*, 468 F. 2d 989 (C.A. 2); *Ramirez v. United States*, 318 F. 2d 155 (C.A. 9). These developments provide the background for petitioner's current claims.

1. Guided by *United States v. Mann*, *supra*, the district court charged the jury that in order to convict petitioner of misapplying bank funds, in violation of 18 U.S.C. 656, it had to find "that the accused acted with the intent to injure and defraud the bank" (Tr. 540). The court then gave the following instructions

¹ Petitioner does not now press his evidentiary claim before this Court.

concerning the manner in which such intent might be proved (Tr. 541-543):

In a case involving willful misapplication of bank funds or credit, the requirement that the defendant intended to injure or defraud the bank may be shown by an unlawful act voluntarily done, the natural tendency of which may have been to injure the bank. It is not necessary, however, that actual injury to the bank be shown.

A reckless disregard of the interest of the bank is, for the purpose of willful misapplication, the equivalent of intent to injure or defraud the bank.

* * * * *

It is reasonable to infer that a person ordinarily intends the natural and probable consequences of his knowing acts. The jury may but is not required to draw the inference and find that the accused intended all of the consequences which one standing in like circumstances and possessing like knowledge should reasonably have expected to result from any intentional act or conscious omission. Any such inference drawn is entitled to be considered by the jury in determining whether or not the Government has proved beyond a reasonable doubt that the defendant possessed the requisite criminal intent.

* * * * *

As stated before, the burden is always upon the prosecution to prove beyond a reasonable doubt every essential element of the crime charged. The law never imposes upon a de-

fendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

Petitioner contends (Pet. 8-10) that the district court erred in telling the jury that "[i]t is reasonable to infer that a person ordinarily intends the natural and probable consequences of his knowing acts." In petitioner's view, this statement shifted the burden of proof on intent from the government to the defendant. Petitioner is incorrect.

No court of appeals has objected to a charge that merely permits the jury to infer from a person's knowing acts that he intended the likely consequences of those acts. The instructions criticized in the cases cited by petitioner and in other court of appeals' decisions fall into two basic categories: either they speak in terms of legal presumptions arising from an individual's acts (e.g., "[t]he law presumes that every man intends the natural and probable consequences of his own knowing acts"),² or they allow the jury to infer intent "unless the contrary appears from the evidence."³ Both of these formulations have been held to impose upon defendants an improper burden of

² See, e.g., *United States v. Netterville*, 553 F. 2d 903, 917-918 (C.A. 5), certiorari denied, No. 77-237, January 9, 1978; *United States v. Wilkinson*, 460 F. 2d 725, 729-734 (C.A. 5); *United States v. Bertolotti*, 529 F. 2d 149, 159 (C.A. 2).

³ See, e.g., *United States v. Chiantese*, 560 F. 2d 1244 (C.A. 5) (*en banc*); *United States v. Robinson*, 545 F. 2d 301, 305-306 (C.A. 2); *United States v. Diggs*, 527 F. 2d 509, 513-515 (C.A. 8); *Cohen v. United States*, 378 F. 2d 751, 755 (C.A. 9); *United States v. Releford*, 352 F. 2d 36, 40 (C.A. 6); *Mann v. United States*, 319 F. 2d 404 (C.A. 5), certiorari denied, 375 U.S. 986.

producing evidence that tends to negate criminal intent.

By contrast, the charge given in this case straightforwardly and accurately informed the jury that it was free either to draw an inference of intent on the basis of petitioner's acts or not to draw such an inference. The instruction now challenged by petitioner is an almost verbatim rendition of the instruction specifically approved by the *en banc* court of appeals after a thorough review of the relevant cases. See *United States v. Chiantese*, 560 F. 2d 1244, 1255-1256 (C.A. 5). The only departure from the language endorsed in *Chiantese* was the addition of a phrase designed to emphasize that the jury was not "required to draw the inference" of intent from petitioner's acts. If anything, as the court of appeals observed, this modification benefited petitioner (see Pet. App. 6a-7a). Moreover, the district court's charge taken as a whole left no doubt that the government bore the burden of proving every element of the offenses charged beyond a reasonable doubt. Under these circumstances, the court of appeals properly found that the jury instructions did not shift the burden of proof on the issue of intent.

2. In the court of appeals, petitioner argued that his convictions for unauthorized issuance of letters of credit should be reversed, because the district court failed to instruct the jury that intent to defraud is an element of an offense under the second paragraph of 18 U.S.C. 1005. Petitioner maintained that the court of appeals had reached inconsistent results in deciding

United States v. Mann, supra (intent to defraud necessary under Section 656), and *Harrison v. United States, supra* (no intent to defraud necessary under the first two paragraphs of Section 1005). In support of this contention, petitioner cited the legislative history of Sections 656 and 1005 summarized above. Petitioner also stressed that in *United States v. Pollack, supra*, the Ninth Circuit had concluded that an intent to injure or defraud "was undoubtedly intended as a requirement of all three paragraphs" of Section 1005 (503 F. 2d at 91).*

The court of appeals did not formally rule on the validity of petitioner's convictions under Section 1005. Though noting that under established Fifth Circuit policy an individual panel would not be free to depart from the *Harrison* holding, the court pretermitted consideration of the unauthorized issuance counts in reliance on the concurrent sentence doctrine (Pet. App. 14a). Petitioner now repeats his claim that, *Harrison* notwithstanding, an intent to defraud must be proved in order to establish a violation of Section 1005 (Pet. 5-8). Petitioner also asserts (Pet. 10-12)

* Petitioner originally advanced this argument in the district court, both during trial (Tr. 173-181) and in a post-conviction motion for a new trial. In its order denying petitioner's motion (Pet. App. C), the district court acknowledged the seeming inconsistency between *Mann* and *Harrison* and also recognized the conflict between *Harrison* and *Pollack*. The court nevertheless determined that it should adhere to the construction of Section 1005 adopted in *Harrison*. If the *Harrison* rule is to be changed, said the court, it "should be changed by [the] Fifth Circuit" (Pet. App. 2c).

that the court of appeals erred in invoking the concurrent sentence doctrine and thereby refusing to resolve the intent issue.

In *Benton v. Maryland*, 395 U.S. 784, 787-791, this Court reviewed the historical evolution of the concurrent sentence doctrine and recognized the utility of that doctrine as "a rule of judicial convenience." Finding that the dispute in *Benton* did not present the question, the Court expressly abstained from considering whether constitutional problems might be created by "an attempt to impose collateral consequences after an initial refusal to review a conviction on direct appeal because of the concurrent sentence doctrine * * *" (395 U.S. at 791 n. 7). In his concurring opinion, Mr. Justice White agreed that "the concurrent sentence rule * * * should be preserved as a matter of proper judicial administration both on direct appeal and collateral attack, although at least in theory it raises a number of questions concerning the subsequent effects of the unreviewed counts" (395 U.S. at 800). See also *Andersen v. Maryland*, 427 U.S. 463, 469 n. 4; *Barnes v. United States*, 412 U.S. 837, 848 n. 16.

In the aftermath of *Benton*, the Fifth Circuit has stated that application of the concurrent sentence doctrine is appropriate when "prejudice is not apparent and the possibility of adverse collateral consequences

appears to be remote."⁵ *United States v. Binetti*, 547 F. 2d 265, 269 (C.A. 5). See also *United States v. Smith*, 550 F. 2d 277, 285 (C.A. 5); *Government of Canal Zone v. Fears*, 528 F. 2d 641, 644 (C.A. 5). In an effort to show prejudice, petitioner now reiterates the claims first advanced in his brief and petition for rehearing in the court of appeals, namely, that evidence introduced in support of the unauthorized issuance counts may have "spilled over" and influenced the jury's verdict on the misapplication counts, and

⁵ Other courts of appeals have followed somewhat different approaches. The Seventh Circuit, for example, has said that it will consider the validity of all challenged convictions unless "there is no possibility of undesirable collateral consequences attendant upon these convictions." *United States v. Tanner*, 471 F. 2d 128, 140 (C.A. 7), certiorari denied, 409 U.S. 949. See also *Crovedi v. United States*, 517 F. 2d 541, 550 (C.A. 7); *United States v. McLeod*, 493 F. 2d 1186, 1189 and n. 1 (C.A. 7). The Sixth Circuit has exercised its discretion to resolve some claims and prepermit others, without stating a general rule. Compare, e.g., *United States v. Maze*, 468 F. 2d 529 (C.A. 6), affirmed, 414 U.S. 395, with *Ethridge v. United States*, 494 F. 2d 351 (C.A. 6), certiorari denied, 419 U.S. 1025. The District of Columbia Circuit routinely vacates concurrent sentences, subject to reinstatement and full appellate review if the sentence considered and affirmed on appeal should be set aside by this Court or on collateral attack. See, e.g., *United States v. Hooper*, 432 F. 2d 604 (C.A. D.C.). Because petitioner was not prejudiced by the court of appeals' treatment of the Section 1005 counts, this case does not present an appropriate occasion for this Court to answer the questions left open in *Benton* or, in an exercise of its supervisory power, to impose on the courts of appeals a particular method of applying the concurrent sentence doctrine.

that the unreviewed convictions under Section 1005 may have affected the sentence imposed on the basis of the convictions under Section 656. Petitioner further alleges that, because of the court of appeals' failure to review the letter of credit convictions, he may be subject to a "substantial money judgment." None of these assertions demonstrates any impropriety in the court of appeals application of the concurrent sentence doctrine.

First, the record contains no indication whatever that the jury, in arriving at its verdict on the Section 656 counts, wrongly considered evidence relevant only to the Section 1005 counts. On the contrary, the record reveals that the evidence on each count was introduced independently and that the court carefully instructed the jury to give separate attention to each count and its supporting evidence (Tr. 533-534, 543). The court explicitly told the jury that a finding of guilt or innocence on any one count should not affect the outcome on other counts (Tr. 543). More important, any evidentiary "spill over" that did occur was the consequence not of the court of appeals' failure to review the unauthorized issuance convictions, but of the decision to conduct a single trial on a multi-count indictment, a procedure about which petitioner does not complain. Even if the court of appeals had reversed the convictions on the letter of credit counts, petitioner would not have been entitled to a new trial on the misapplication counts. See, e.g., *United States v. Tanner*, 471 F. 2d 128, 142-143 (C.A. 7), certiorari

denied, 409 U.S. 949; *United States v. Maze*, 468 F. 2d 529, 536-538 (C.A. 6), affirmed, 414 U.S. 395.

Similarly an examination of the record does not produce the slightest reason to believe that the sentence imposed on the Section 656 counts was adversely affected by the verdict on the Section 1005 counts. Petitioner was convicted on two counts of misappropriating bank funds. The total amount of money involved in these charges was over \$125,000. Petitioner faced a sentence of up to five years' imprisonment on each count. The district court's sentence, concurrent terms of three years' imprisonment, was entirely reasonable even in the absence of any additional charges. This case is therefore unlike *United States v. Barash*, 365 F. 2d 395 (C.A. 2), and *United States v. Jenkins*, 530 F. 2d 1203 (C.A. 5), cited by petitioner.

In *Barash*, appellant was convicted on 26 counts of a 32-count indictment charging him with bribing internal revenue agents. He was sentenced to concurrent terms of one year and one day on each count. Only two of the 26 convictions withstood appellate scrutiny. Each of the two surviving counts charged appellant with aiding and abetting an internal revenue agent in the illegal receipt of a \$25 payment. Under these circumstances, the court of appeals refused to apply the concurrent sentence doctrine. The court expressed justifiable concern over the possibility that "the jury might * * * have exercised its prerogative of leniency if these charges alone had been before it; or that the judge [might not] have given the same

sentence for convictions on these two aiding and abetting counts as he did for those on the twenty-six, including convictions of bribery" (365 F. 2d at 403).

Jenkins is also inapposite. There, appellant was convicted on three counts of selling heroin and was sentenced to consecutive terms of 15 years' imprisonment on each count. Subsequently, pursuant to Rule 35, Fed. R. Crim. P., the district court decreed that the sentences on two of the counts should run concurrently, but still consecutively to the sentence imposed on the remaining count. The court of appeals then reversed the conviction on this latter count. In view of the fact that the concurrent sentences on the other two counts were to run consecutively to the sentence on the reversed count, the court of appeals remanded the case to the district court either for supplementation of the record to show affirmatively that the sentences had been determined independently or for resentencing without consideration of the invalid count. Here, by contrast, no consecutive sentences were imposed and application of the concurrent sentence doctrine was proper.

Also groundless is petitioner's assertion that a substantial money judgment was entered against him as a result of the court of appeals' failure to review his letter of credit convictions. As a threshold matter, potential civil liability may not be the sort of collateral consequence that should weigh against application of the concurrent sentence rule. But, in any event, the money judgment at issue here could not possibly have been influenced by the court of appeals' decision. The

judgment was entered on October 5, 1976 (Pet. App. E). Petitioner was not convicted until October 29, 1976, and the court of appeals did not affirm until September 14, 1977. At no time has petitioner described how the court of appeals' action might have affected the outcome of the civil suit.

Even though not raised by petitioner in either this Court or the court of appeals, one possible adverse consequence of convictions left unreviewed under the concurrent sentence doctrine merits brief comment. Under guidelines established by the United States Parole Commission, the approximate length of time to be served before release on parole is determined by reference to a matrix involving two variables, the severity of the offense committed and the personal characteristics of the offender. See 42 Fed. Reg. 39813-39815 (to be codified at 28 C.F.R. 2.20). A note to the adult parole eligibility table provides that "[i]f an offense behavior involved multiple separate offenses, the severity level may be increased." 42 Fed. Reg. 39815. Citing this statement, the Eighth Circuit recently refused to apply the concurrent sentence rule, because it feared that an unreviewed conviction might have undesirable parole consequences. See *United States v. Holder*, 560 F. 2d 953 (C.A. 8). Whatever the validity of this concern in *Holder*,⁶ it is largely irrelevant on the facts of this case. Under the Parole Commission guidelines, the misapplication

⁶ Despite its ruling in *Holder*, the Eighth Circuit has by no means abandoned the concurrent sentence doctrine. See, e.g., *United States v. Eisler*, C.A. 8, No. 77-1042, decided December 19, 1977.

offenses considered alone would fall in the "very high severity" category, because they are property offenses involving a total amount in excess of \$100,000. See 42 Fed. Reg. 39814. Even assuming petitioner's personal rating placed him in the most favorable category, his "parole prognosis" would indicate that he should serve 26 to 36 months before release. Since petitioner has been sentenced to three years' imprisonment, the possibility that his letter of credit convictions will affect his parole eligibility appears remote. Indeed, even if petitioner's sentence were longer, the likelihood that the Parole Commission would increase the severity level of his offenses from "very high" to "greatest" is negligible. The latter category is reserved for a small number of the most heinous offenses, including willful homicide, kidnapping, aircraft hijacking, and narcotics sales in excess of \$100,000. Because petitioner has not raised any question regarding his parole opportunities and because those opportunities will not be diminished by the decision below, this Court should not review the court of appeals' sound exercise of its discretion in applying the concurrent sentence rule.¹

¹ Likewise, where resolution of the issue will have no significant impact upon petitioner, this Court should not address the conflict among the courts of appeals on the question whether intent to defraud is an element of an offense under the first two paragraphs of Section 1005. The decisions of the Fifth Circuit in *Harrison v. United States, supra*, and the Ninth Circuit in *United States v. Pollack, supra*, appear irreconcilable, and may eventually necessitate intervention by this Court, but, on the other hand, one or the other of those courts may alter its view of the issue and eliminate the conflict.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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